J Rasvindar Singh a/l Jaggir Singh v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–04 OF 2008
AHMAD MAAROP, CLEMENT SKINNER AND APANDI ALI JJCA
26 JANUARY 2012

Evidence — Accomplice — Credibility — Failure of trial court to consider if accomplices-turned-prosecution witnesses credible or reliable — Whether court's reasons for accepting accomplices' evidence erroneous — Whether cautioned statement of accomplice implicating third-party in murder could have raised reasonable doubts in prosecution's case — Whether 'information' given by accused to police could not have led to discovery of murder weapon — Whether such 'information' unqualified for admission as evidence — Whether trial court failed to exercise maximum evaluation of prosecution's evidence

The appellant appealed to the Court of Appeal against conviction and sentence on a charge of murder. On account of his age, the High Court which found him guilty sentenced him to be detained in prison at the pleasure of the Ruler pursuant to s 97(2) of the Child Act 2001. In the trial court the appellant was jointly charged for the crime with another person named Kartik, but the latter was acquitted and discharged at the end of the prosecution's case. The trial court found a prima facie case had been made out against the appellant alone and his defence was called on an amended charge holding him solely liable for the murder. The trial court came to that conclusion after accepting the evidence of three others, SP6, SP8 and SP9, who were at the scene of the crime, the discovery of the alleged murder weapon — a piece of wood — from information the appellant gave police after his arrest, and the evidence of SP9 exculpating Kartik of the offence. When the charge for the murder was first made at the magistrate's court, SP6 and SP8 were jointly charged with the appellant. SP6 and SP8 were detained for a few months before the charges against them were withdrawn and when the trial commenced six months later, both of them had become prosecution witnesses. SP6 told the trial court that on the night of the incident two motorcycles, one ridden by himself and the other by SP8, with Kartik and the appellant being their respective pillion riders, chased another motorcycle ridden by the deceased with SP9 riding pillion. SP6 said that at that time, Kartik and the appellant were each armed with a long stick and they both assaulted the deceased when he fell off his machine. In the Court of Appeal, the appellant submitted that: (i) the trial court failed to consider that SP6 and SP8 were not credible or reliable witnesses as they were accomplices in the murder; (ii) the information allegedly given by the appellant to police that led to the discovery of the piece of wood was wrongly admitted; (iii) sufficient consideration had not been given to SP6's

cautioned statement tendered by the defence in evidence which stated that Kartik had also assaulted the deceased, and (iv) there had not been a maximum evaluation of the prosecution's evidence as mandated by s 180 of the Criminal Procedure Code.

Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) The prosecution had failed to establish a prima facie case and the defence should not have been called (see para 25).

(2) Even considering the defence — when SP6's cautioned statement ('D28') was tendered in evidence — the trial judge should have re-evaluated and tested SP6's evidence with the evidence found in D28 which, inter alia, stated that Kartik had also assaulted the deceased. Had that been done, the trial judge would have concluded that a reasonable doubt had been raised by the appellant (see paras 27–28).

(3) As the appellant's defence was called on an amended charge (which excluded the common intention element), evidence of Kartik's participation in the assault on the deceased would have undoubtedly created doubts in the prosecution's case (see para 29).

(4) The failure to consider that SP6 and SP8 were interested witnesses and who did not give consistent narratives of the events and the failure to properly evaluate the probative value of SP9's evidence showed the trial judge had not exercised a maximum evaluation of the prosecution's evidence (see para 17).

(5) The trial judge accepted that SP6 and SP8 were accomplices but there was no discussion as to why he accepted them as reliable witnesses. The judge held he accepted their evidence because they did not contradict each other and it was corroborated by SP9's evidence and the evidence of the discovery of the murder weapon. In fact, SP6 and SP8 did contradict each other (as to who assaulted the deceased) while SP9's evidence was neutral (he did not know who assaulted the deceased) (see paras 14–15).

(6) The trial judge's failure to consider SP9's credibility based on the fact of his false information to the doctor and police at the hospital that the deceased was injured in a traffic accident was a misdirection on his part in the maximum evaluation exercise of the prosecution's evidence (see paras 19 & 21).

(7) The information said to have been given by the appellant to the police, on the face of it, was not one that would have led to any discovery and did not qualify to be admitted as evidence under s 27 of the Evidence Act

1950. The so-called information was highly prejudicial to the appellant and was wrongly admitted and relied upon by the trial judge (see para 24).

[Bahasa Malaysia summary

Perayu telah merayu ke Mahkamah Rayuan terhadap sabitan dan hukuman atas pertuduhan membunuh. Setelah mengambilkira umurnya, Mahkamah Tinggi yang mendapatinya bersalah telah menjatuhkan hukuman ke atasnya agar ditahan di penjara atas titah Yang di Pertuan Agong menurut s 97(2) Akta Kanak-Kanak 2001. Dalam perbicaraan mahkamah perayu telah dituduh bersama untuk jenayah itu dengan seorang bernama Kartik, tetapi Kartik telah dibebas dan dilepaskan di akhir kes pendakwaan. Mahkamah perbicaraan mendapati terdapat kes prima facie dibuat terhadap perayu seorang sahaja dan pembelaannya dipanggil atas pertuduhan pindaan yang memutuskan yang dia semata-mata bertanggungjawab untuk pembunuhan itu. Mahkamah perbicaraan tiba kepada kesimpulan selepas menerima keterangan tiga yang lain, SP6, SP8 dan SP9, yang berada di tempat kejadian jenayah itu, penemuan senjata pembunuhan yang dikatakan itu — sebatang kayu — berdasarkan maklumat perayu yang diberikan kepada polis selepas tangkapannya, dan keterangan SP9 yang melepaskan Kartik daripada kesalahan itu. Apabila pertuduhan untuk membunuh pertama kali dibuat di mahkamah majistret, SP6 dan SP8 telah dituduh bersama dengan perayu. SP6 dan SP8 telah ditahan untuk beberapa bulan sebelum pertuduhan-pertuduhan terhadap mereka ditarik balik dan apabila perbicaraan bermula enam bulan kemudian, kedua-dua mereka telah menjadi saksi-saksi pendakwaan. SP6 memberitahu mahkamah perbicaraan bahawa pada malam kejadian dua motosikal, satu dipandu olehnya sendiri dan satu lagi oleh SP8, dengan Kartik dan perayu sebagai pembonceng mereka, telah mengejar satu lagi motosikal yang dibawa oleh si mati dengan SP9 sebagai pembonceng. SP6 mengatakan bahawa pada masa itu, Kartik dan perayu masing-masing memegang kayu panjang dan mereka berdua telah menyerang si mati apabila dia terjatuh daripada motosikalnya. Di Mahkamah Rayuan, perayu telah berhujah bahawa: (i) mahkamah perbicaraan telah gagal mengambilkira bahawa SP6 dan SP8 bukan saksi-saksi yang boleh dipercayai atau yang boleh bergantung kepada mereka kerana mereka merupakan rakan sejenayah dalam pembunuhan itu; (ii) maklumat yang dikatakan telah diberikan oleh perayu kepada polis yang membawa kepada penemuan batang kayu itu telah salah diterima masuk; (iii) pertimbangan mencukupi tidak diberikan kepada kenyataan beramaran SP6 yang ditenderkan oleh pihak pembelaan dalam keterangan yang menyatakan bahawa Kartik juga telah menyerang si mati; dan (iv) tiada penelitian maksimum terhadap keterangan pendakwaan sebagaimana yang dimandatkan oleh s 180 Kanun Acara Jenayah.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman dan melepas dan membebaskan perayu: A

(1) Pendakwaan telah gagal membuktikan kes prima facie dan pembelaan tidak patut dipanggil (lihat perenggan 25).

(2) Walaupun setelah mengambilkira pembelaan — apabila kenyataan beramaran SP6 ('D28') ditenderkan sebagai keterangan — hakim perbicaraan patut meneliti semula dan menguji keterangan SP6 dengan keterangan yang ditemui dalam D28 iaitu, antara lain, menyatakan bahawa Kartik juga telah menyerang si mati. Jika telah berlaku begitu, hakim perbicaraan mungkin telah memutuskan bahawa keraguan munasabah telah ditimbulkan oleh perayu (lihat perenggan 27–28). B C

(3) Oleh kerana pembelaan perayu telah dipanggil atas pertuduhan pindaan (yang mengecualikan elemen niat bersama), keterangan tentang penglibatan Kartik dalam serangan ke atas si mati tanpa diragui akan menimbulkan keraguan dalam kes pendakwaan (lihat perenggan 29). D

(4) Kegagalan untuk mengambilkira bahawa SP6 dan SP8 adalah saksi-saksi berkepentingan dan tidak memberi cerita yang konsisten berhubung kejadian dan kegagalan untuk meneliti dengan wajar nilai probatif keterangan SP9 menunjukkan hakim perbicaraan tidak membuat penelitian maksimum ke atas keterangan pendakwaan (lihat perenggan 17). E

(5) Hakim perbicaraan menerima bahawa SP6 dan SP8 adalah rakan sejenayah tetapi tidak ada perbincangan berhubung kenapa beliau menerima mereka sebagai saksi-saksi yang boleh dipercayai. Hakim memutuskan beliau menerima keterangan mereka kerana mereka tidak bercanggah antara satu sama lain dan ia disokong oleh keterangan SP9 dan keterangan penemuan senjata pembunuhan. Bahkan, SP6 dan SP8 ada bercanggah antara satu sama lain (berhubung siapa yang menyerang si mati) manakala keterangan SP9 adalah neutral (dia tidak mengetahui siapa yang menyerang si mati) (lihat perenggan 14–15). F G

(6) Kegagalan hakim perbicaraan untuk mengambilkira kebolehpercayaan SP9 berdasarkan fakta maklumat palsunya kepada doktor dan polis di hospital bahawa si mati cedera dalam kemalangan trafik merupakan satu salah arah di pihak beliau dalam menggunakan penelitian maksimum terhadap keterangan pendakwaan (lihat perenggan 19 & 21). H

(7) Maklumat yang dikatakan telah diberikan oleh perayu kepada polis, pada dasarnya, bukan satu yang boleh membawa kepada apa-apa penemuan dan tidak wajar diterima masuk sebagai keterangan di bawah s 27 Akta Keterangan 1950. Maklumat tersebut amat prejudis terhadap perayu dan telah salah diterima dan digunakan oleh hakim perbicaraan (lihat perenggan 24).] I

Notes

For cases on credibility, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 47–50.

Cases referred to

Amathevelli a/p Ramasamy v PP [2009] 2 MLJ 367; [2009] 2 AMR 281, FC (refd)
Liow Siow Long v PP [1970] 1 MLJ 40 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
TN Nathan v PP [1978] 1 MLJ 134 (refd)

Legislation referred to

Child Act 2001 s 97(2)
Criminal Procedure Code s 180
Evidence Act 1950 s 27
Penal Code s 302

Appeal from: Criminal Suit No 45–24 of 2002 (High Court, Alor Setar)

Karpal Singh (Jagdeep Singh Deo with him) (Karpal Singh & Co) for the appellant.
Awang Armadajaya (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Apandi Ali JCA:

INTRODUCTION

[1] The appellant was found guilty and convicted for an offence under s 302 of the Penal Code. Due to the appellant's young age, the appellant was sentenced to be detained in prison at the pleasure of the ruler, under s 97(2) of the Child Act 2001.

[2] At the commencement of the trial, the appellant was charged with another co-accused, Kartik a/l Thavasi Kanoo and the charge reads as follows:

> Bahawa kamu bersama-sama pada 3.3.2002 jam lebih kurang 11.00 malam, di tepi jalan, berdekatan bengkel JKR, Jalan Lencongan Timur Aman Jaya di Daerah Kuala Muda, di dalam Negeri Kedah, telah dengan sengaja mendatangkan kematian kepada Saravanan a/l Jay Remey KP 830509-02-5933. Oleh yang demikian telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama seksyen 34 Kanun Keseksaan.

[3] At the end of the case for the prosecution, the trial court acquitted and

discharged the co-accused and the appellant's defence was called on an amended charge, which reads as follows:

> Bahawa kamu pada 3.3.2002 jam lebih kurang 11.00 malam, di tepi jalan berdekatan bengkel JKR, Jalan Lencongan Timur Aman Jaya, dalam Daerah Kuala Muda, dalam Negeri Kedah Darul Aman telah melakukan kesalahan membunuh ke atas Saravanan a/l Jay Remey (KP 830509-02-5933) dan oleh itu kamu telah melakukan kesalahan di bawah seksyen 302 Kanun Keseksaan.

FACTUAL MATRIX OF THE CASE

[4] The facts of the case are well set out in the judgment of the learned trial judge. Thus in this judgment, we need not repeat the facts, but shall only refer to the basic relevant facts and events as found by the learned trial judge.

[5] According to the pathologist, SP7, the cause of death was due to 'head injury due to blunt trauma'. This fact was undisputed.

[6] On the night of the incident, the deceased, Saravanan was a rider of a motorcycle with SP9, Kesavan as his pillion rider. The appellant was the pillion rider of a motorcycle ridden by SP8, Ganesan. The co-accused, Kartik was the pillion rider of another motorcycle ridden by SP6, Sugumar.

[7] According to SP6, Sugumar, he and SP8, Ganesan, with their respective pillion riders chased after the motorcycle ridden by the deceased. SP6 also gave evidence that both the appellant and the co-accused, Kartik as pillion riders had a long stick each. On the instructions of Kartik, the deceased motorcycle was blocked by the motorcycle ridden by SP6. SP6 further narrated that, Kartik jumped from the motorcycle and assaulted the pillion rider ('SP9') and at that time the deceased fell from his motorcycle. Both, Kartik and the appellant then assaulted the deceased who was lying on the ground. According to SP9, Kasavan, the assault incident took place within a short span of time of between 3–4 minutes only and there were six persons at the material time.

[8] Those are the relevant facts but nevertheless disputed.

FINDINGS BY THE HIGH COURT

[9] The learned trial judge, at the end of the prosecution's case made a finding that a prima facie case has been proved against the appellant alone. The findings by the learned trial judge as to the act of the appellant that constituted the commission of the alleged offence were based on:

(a) the acceptance of the evidence of SP6, Sugumar; SP8, Ganesan and SP9, Kasavan;

(b) the evidence of information leading to discovery of a piece of wood given by the appellant after his arrest by the police; and

(c) the evidence of SP9, Kasavan, which exculpated the co-accused, Kartik of the offence.

THE APPELLANT'S CONTENTIONS

[10] The appellant's counsel put forward three basic contentions:

(a) that there was no maximum evaluation of the prosecution evidence as mandated under s 180 of the Criminal Procedure Code and as reaffirmed by the case law of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 and as approved by the Federal Court in *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805;

(b) that there was a failure to consider that the witnesses, SP6 and SP8 as accomplices, are in the circumstances, not credible or reliable;

(c) that the information leading to discovery given by the appellant was wrongly admitted; and

(d) that the defence story has not been properly evaluated, namely not tested with the cautioned statement of SP6, Sugumar, which was tendered by the defence as exh D28.

OUR ANALYSIS AND FINDINGS

[11] As the contentions by the appellant in (a) and (b) above are inter-related, we shall deal with them together.

[12] It is not in dispute that SP6 and SP8 were originally jointly charged with the appellant for the alleged offence. This can be seen at the initial charging at the magistrate's court at Sungai Petani. This was on 18 March 2002. When the trial commenced on 2 September 2002, both SP6 and SP8 became prosecution witnesses.

[13] From the events prior to and leading to the alleged assault on the deceased, it was also undisputed that both SP6 and SP8 were accomplices. In fact the learned trial judge did indicate that he accepted the defence submission that SP6 and SP8 were accomplices. It is our judgment that having accepted that fact, the trial judge ought to have taken the next step of considering whether the witnesses are reliable or otherwise. Having been satisfied as to the issue of reliability then only the subsequent step of evaluating whether there is

a need of corroborative evidence can be taken. The law on this has been succinctly put by Gunn Chit Tuan J in *TN Nathan v Public Prosecutor* [1978] 1 MLJ 134 at p 137, which reads:

> It was common ground that he was an accomplice and that there was no corroboration of his testimony. Even if there was corroboration, the evidence of the accomplice in this case could not be corroborated because he was not a credible or reliable witness. Thus it was held by the Supreme Court of India in the case of *Sarwan Singh v State of Punjab* AIR 1957 SC 637, 641 that:
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> … before the court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver then there is an end of the matter, and no question as to whether his evidence is corroborated or not falls to be considered.
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> In other words, the appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of the approver.
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> Lord Hailsham has expresses a similar opinion in the English House of Lord's case of *Director of Public Prosecutions v Kilbourne* [1973] 1 All ER 440, 452 when he said as follows:
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> Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise.
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> In our case, as the accomplice could not be considered a reliable or credible witness, the question of corroboration therefore did not arise.

[14] The learned trial judge held that he accepted SP6 and SP8 evidence, despite them being accomplices, because he found that their evidence did not contradict each other and that it was corroborated by the evidence of SP9 and the evidence of the discovery of the weapon, exh P23B. This is illustrated in his grounds, when he wrote:

> Saya sedar dan menerima hujah pembelaan bahawa SP6 dan SP8 adalah rakan sejenayah kerana terlibat dalam kes tersebut tetapi saya mendapati keterangan mereka tidak bercanggah di antara satu sama lain dan yang lebih penting lagi ialah keterangan-keterangan mereka disokong oleh keterangan SP9 dan juga penemuan senjata yang digunakan iaitu ekshibit P23B.

[15] There was no discussion as to why SP6 and SP8 were accepted as reliable witnesses. A fortiori, there was no mention of the fact that both SP6 and SP8 were detained for a few months before the charges were withdrawn against them. From such circumstances, it can be reasonably inferred that SP6 and SP8 are interested witnesses. On the finding that there was no contradictions between the evidence of SP6 and SP8, upon a closer scrutiny of their evidence, we find otherwise. At p 22 of the appeal records, SP6 said: 'Semasa saya melihat Kartik dan Rasvindar memukul mangsa, saya berada di atas motosikal …'. Whereas, SP8, at p 43 said: 'Rasvindar memukul mangsa iaitu yang menunggang motosikal itu. Dia bukan mangsa yang Kartik pukul itu.'

[16] As to the corroboration by SP9, we find that SP9's evidence is neutral in nature. This can be seen in his evidence at pp 50–52 of the appeal records, where SP9 said: 'Saya tidak tahu siapa yang memukul saya …'. 'Saya tidak tahu siapa yang memukul Saravanam. Saya nampak Saravanam dipukul …'. '… pada mulanya Saravanam yang dipukul dan selepas itu mereka memukul saya.'

[17] The failure to consider that SP6 and SP8 were interested witnesses and who did not give consistent narratives of the events and the failure to properly evaluate the probative value of SP9's evidence, does not indicate that a maximum evaluation of the evidence has been exercised by the learned trial judge.

[18] On interested witnesses, we are mindful of what Raja Azlan Shah J (as HRH then was) said in *Liow Siow Long v Public Prosecutor* [1969] 1 MLJ 40, at p 41, which reads as follows:

> Testimony of close relations is not tainted if it is otherwise reliable in the sense that the witnesses and competent witnesses who were at the scene of the occurrence and could have seen what had happened. But if it is proved that they are not entirely disinterested witnesses, eg, they are either partisans of the complainant or are in any way inimical to the accused, then their testimony is tainted and requires corroboration if to be acted upon.

[19] On the issue of credibility, we also noted that the learned trial judge did not consider the fact that SP9 gave false information to the doctor on duty at Sungai Petani Hospital to the effect that the deceased was injured in a traffic accident. It was also in evidence that SP9 also told the police at the hospital that the deceased was knocked by a car. This piece of evidence, which was adduced during cross-examination, can be seen at p 54 of the appeal records, which reads:

> S : Selain daripada beritahu doktor ada awak beritahu Polis bernama Zainal Abidin yang Saravanan dilanggar kereta?

Ya. J :

[20] On re-examination, SP9 (at p 55 of the appeal records) said:

> Saya beri maklumat palsu kepada Polis di Pondok Polis Hospital kerana saya takut kerana Saravanan telah meninggal dunia.

[21] This evidence, given by a prosecution witness, ought to be viewed critically as such evidence will greatly affect the credibility of the witness. Any failure to do so is an indication of non-direction on the maximum evaluation exercise of prosecution evidence. Such non-direction is a misdirection by the learned trial judge.

[22] On the information leading to discovery. The governing provision is s 27 of the Evidence Act 1950. In this case, such evidence was adduced through the IO, ASP Lim Soh Aik, SP10. The relevant portion of the evidence, can be seen at pp 57–58 of the appeal records, which reads as follows:

> Kita ada tahan Kartik dan Ganesan a/l Narayanan. Saya ada buat soalsiasat ke atas Rasvindar pada 11.3.2002 bersama Kpl Mogan dan Amaresan di Pejabat Mata-mata Gelap IPD Kuala Muda. Rasvindar ada beri maklumat. Selepas itu saya bersama Kpl Mogan, L/Kpl Amaresan, Lim, Ang dan Jasvinder Singh telah pergi ke rumah kedai di Taman Songket. Di situ Rasvindar Singh telah tunjuk sebatang kayu di longkang depan kedai No 1, Lorong Songket. Di situ Rasvindar Singh telah tunjuk sebatang kayu di longkang depan kedai No 1, Lorong Songket 1. Saya arahkan L/Kpl. Roslan ambil gambar tempat kayu itu ditemui dan saya rampas kayu itu. Saya tanda kayu itu 'C2'.
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> Maklumat yang diberi oleh Rasvindar Singh ialah kayu itu digunakan untuk memukul simati.

[23] From the reading of the oral evidence of SP10, the information said to be given is:'… kayu itu digunakan untuk memukul si mati.' On the face of it, such information does not lead to any discovery. On that score alone that information does not qualify to be admitted as evidence under the provisions of s 27 of the Evidence Act 1950.

[24] Even if the so-called information was as alleged to have been taken down in writing in the form of the police report, exh P26, it is our judgment that such information is not a piece of evidence admissible under s 27. It has been held by the Federal Court in *Amathevelli a/p Ramasamy v Public Prosecutor* [2009] 2 MLJ 367; [2009] 2 AMR 281 that evidence of information leading to discovery must be oral evidence. The actual words used by the giver of the information must be stated orally. This is not the position in the case in hand. Furthermore the words 'kayu itu digunakan untuk memukul si mati' as

testified by SP10 are not the same as the purported information stated in the police report. Such evidence is highly prejudicial to the appellant. It is our judgment that the admission of such prejudicial evidence was wrongly admitted and ought not to be relied upon by the learned trial judge.

[25] For the reasons stated above, it is our finding that the prosecution has failed to establish a prima facie case and as such defence should not have been called.

[26] However, if for a moment, our finding above is wrong, we shall consider and evaluate the appellant's defence.

[27] In his defence the appellant tendered the cautioned statement of Sugumar, SP6 and it was marked as exh D28. D28 can be seen at pp 223–226 and the relevant portion to be evaluated is at p 225, which, inter alia, reads:

> *Kartik juga memukul Saravanan* dan kawan Saravanan dengan kayu.

[28] In view of such evidence, it is incumbent upon the trial judge to re-evaluate SP6's evidence. SP6's evidence has to be tested with the admissible evidence found in exh D28. Had such exercise been done, it is our judgment that the trial judge would have concluded that a reasonable doubt had been raised by the appellant.

[29] Bearing in mind that the appellant's defence was called on an amended charge (which excluded the common intention element), the evidence of the participation of Kartik in the assault on Saravanan, will undoubtedly create doubts in the prosecution's case.

CONCLUSION

[30] We are aware that where a life has been lost, justice must be done to the deceased. But on the other hand an accused person, who is presumed innocent until proven guilty, is entitled to be tried and so proven in accordance with and in the manner required by law.

[31] Based on the number of flaws in the evaluation of the evidence, it is our judgment that this is a fit and proper case for us to interfere with the findings and conclusion of the learned trial judge. For the reasons as explained above, we are convinced that the conviction of the appellant is not safe. The evidence does not irresistibly point to the guilt of the appellant. We therefore, unanimously

allowed the appeal. The conviction and sentence of the appellant is set aside. The appellant is hereby acquitted and discharged.

Appeal allowed, conviction and sentence set aside and appellant acquitted and discharged.

Reported by Ashok Kumar